Central Law Journal.

ST. LOUIS, MO., JUNE 8, 1917.

COMPENSATORY DAMAGES FOR AGGRAVATED WRONG BY THE CIVIL LAW WITH NO PUNITIVE OR EXEMPLARY DAMAGES.

In Vincent v. Morgan's Louisiana & T. R. & S. S. Co., 74 So. 541, Louisiana Supreme Court goes into an elaborate discussion of the nature of "punitive," "vindictive" and "exemplary" damages and holds that in so far as its civil law is concerned these damages have no recognition.

It is said that these damages are those which are "usually given as a punishment to the offender for the benefit of the community and a restraint to the transgressor," such damages being given only in cases "where malice, fraud or gross negligence enter into the cause of action, and in order to warrant their recovery there must enter into the injury some element of aggravation, some coloring of insult or malice that will take the case out of the ordinary rule of compensation."

The theory of courts following the common law is, as we believe, not to consider enhancement of compensatory damages by such considerations as justify punitive or punitory damages. The Louisiana Court however, does take, as we interpret the opinion, into consideration some of the things in the measure of compensatory damages which common law courts do not. It is not very definitely stated that compensatory damages under Louisiana law would in every case or even generally amount to compensatory plus punitive damages at common law, but neither is it said recovery would not come around to the same. But the Louisiana rule, as fixed by the statute, appears to include things that might be recovered for which are not embraced in the common law.

Thus in the case decided there was a suit by both parents of a child that had been killed by a corporation's employe. There was a verdict in favor of each one for $5,000, and they asked that the recovery be increased by an additional $10,000 to both by way of punitive damages.

It is recited that Louisiana statute had given a right of action to "the surviving father *and* mother or either of them," and this was "for the loss of the affection and society which they might otherwise enjoy and for the grief with which they are thereby stricken."

This case refers to the statute which says: "Although the general rule is that damages are the amount of the loss the creditor has sustained or of the gain of which he has been deprived, yet there are cases in which damages may be assessed without calculating altogether on the pecuniary loss or the privation of the pecuniary gain to the party. * * * In the assessment of damages under this rule as well as in cases of offenses, quasi-offenses and quasi-contracts, such discretion must be left to the judge or jury, while in other cases they have none, but are bound to give such damages as will fully indemnify the creditor whenever the contract has been broken by the fault, negligence, fraud or bad faith of the debtor."

The court then refers to decision under Louisiana law to the effect that it is "clear beyond all question that damages are constantly awarded for the cause of outrage, indignity and humiliation visited upon a passenger by expelling him from a vehicle of the carrier, although without violence and although no substantial losses are subsequently entailed upon him as a proximate consequence of the expulsion. If it were not the rule, there would be no right to recover damages for insulting language, or for expelling a passenger in a rude and boisterous manner. * * * Damages given on the footing of humiliation, mortification, mental suffering, etc., are compensatory and not exemplary damages." Thompson on Negligence, § 3288, adopted by Louisiana court.

Judge Thompson cites decisions from courts not following the civil law system for the above proposition, but we think, nevertheless, that such things as he says are esteemed as compensatory damages rather fall under the head of exemplary damages. When such courts as he cites allow also for exemplary damages, there is great probability of double damages being given for the same thing. It seems to us, that, unless there is a very clear defining between what comes under compensatory and exemplary damages the Louisiana rule refusing any recognition of exemplary damages is preferable to that giving it recognition.

It is an abstraction not borne out on any well conceived plan that punishment is inflicted on one member of society in favor of another, or as a deterrent against repetition by the former. The law, except in informer cases or *qui tam* actions, does not proceed on any such principle, and in *qui tam* cases it is done for the enforcement of criminal law.

Our courts are forever setting verdicts aside on the theory that the jury are actuated often by prejudice or passion, or that the case showed no reason for the imposition of punitive damages. But as this character of damages is left greatly to the discretion of the jury, both as to whether they will be awarded and to what extent, why not leave a case in all of its facts to the jury to say whether insult, aggravation, etc., etc., all are to be computed as being or not elements in compensatory damages?

Our common law system on this subject is a hybrid that is trying to stick to some kind of a rule based on technicality and yet is embarrassed by illogical exceptions thereto. If we cannot stick closely to technicality, it were better to plant ourselves on common sense. Discretion on the part of juries, if honestly and fairly relied on, will respond better than where it is extended grudgingly. The Louisiana case we have been considering is reaffirmed in Serio v. American Brewing Co., 74 So. 998.

NOTES OF IMPORTANT DECISIONS.

PROXIMATE CAUSE—STROKE OF LIGHTNING CAUSING A WALL TO FALL.—In Hudgins v. Hann, 240 Fed. 387, decided by Fifth Circuit Court of Appeals, a judgment for plaintiff, owner of a building next to a wall left standing after a fire, for injury caused by lightning striking the wall and causing it to fall on plaintiff's building, was affirmed.

The court goes into considerable discussion to demonstrate that, though defendant had employed competent persons to make the wall safe, yet the employer owing a duty to keep his property safe as against injury to one rightfully on his own property or as to property near by, which by delegation to another, however competent, he cannot escape, then says: "The falling of the wall occurred during a storm in which there was a high wind and lightning. There was evidence tending to prove that there was a stroke of lightning during the storm, which caused or proximately contributed to the collapse of the wall. * * * If the overthrow of the wall was due to its being struck by lightning, the defendant was not liable for an injury so caused, if a reasonably prudent person would not have anticipated that the wall in the condition in which it was permitted to remain was liable to fall as a result of a stroke of lightning; but that the defendant was liable for such injury if a reasonably prudent person would have reasonably anticipated that the lightning was so apt to strike the wall and cause it to fall that such a person would not have permitted it to stand in the condition it was left."

We have read cases where owners of walls leaving them in such condition that a violent wind would cause them to be blown down in a country where such a wind was reasonably to be anticipated, were held for the injury caused. It seems to be taking a step considerably further than those cases go to say that lightning is "so apt to strike" a wall that is insecure against a windstorm that it ought to be protected against lightning. Wind will blow against every wall in its path, but lightning is no more apt to strike a wall that would be thrown down from its stroke than one that would not be. To hold one bound to anticipate a stroke of lightning striking an insecure wall leads inevitably to the conclusion that every wall should be protected against lightning. No one appreciates any particular danger from

being near an insecure wall so far as lightning is concerned. It is said that standing under a tree renders one more liable to be killed by lightning, than if he stands in the open. And yet none will say that an owner of a lot may not have a shade tree in front of his house. But even in wind cases, especially cyclones, it could not be said with certainty that leaving an insecure wall standing was an intervening cause of injury, if a secure wall would have fallen.

DIVORCE—DECREE IN UNCONTESTED SUIT OPENED AND RETRIED; CONTEMPT.—The case of Edwards v. Edwards, 100 Atl. 608, decided by New Jersey Court of Chancery, needs to have some attention called to it.

It shows that a husband brought suit for divorce, charging his wife with adultery. Then there was intervention by a solicitor appointed by the court and, also, an application to punish the plaintiff for contempt in the commission of perjury in his testimony before a master appointed to take the testimony and report. It was conceded that there ought to be a decree dismissing the petition.

The court in reasoning about holding petitioner for contempt, said: "There has been in this class of cases such a vast amount of perjury that when the court finds itself in a position to make an example of a party who has been guilty, it becomes its duty, no matter what its personal feelings may be, to make such an example. * * * The only effective way to stop this class of perjury, when it has, as in this case, been demonstrated to have been committed, is to punish it, as a contempt. It is a contempt and may be punished as such. It may also be punished as a crime. * * * The power to punish for contempt is an arbitrary power and should be used only when absolutely necessary in the interest of justice and then with great care and discretion. Courts will not ordinarily, when the facts are in dispute, punish perjury as a contempt, not because of lack of power, but because sound public policy requires that the offender should be left to the criminal law. But where the facts are admitted or demonstrated, it seems to me that the court would be shirking a clear duty if it did not act. And circumstances may arise which would make it the duty of the court to act, even if it was obliged to weigh evidence. Perjury committed by a petitioner which has induced the court to grant a decree of divorce presents one of this class of cases."

The recital of facts shows that the plaintiff mainly falsified on the question of condonation upon full knowledge of the wife's conduct. It seems to us that, omitting the court's protestations about prevalence of perjury in divorce cases, etc., it would have been better for it to have declared squarely, that courts are always ready to punish any imposition upon them in arresting or interfering with the orderly performance of their duties. If criminal law also may visit punishment, in another way, that has nothing to do with their duties in protecting the administration of justice. If the offense has a double aspect, let the one as to which nothing has yet been done, take care of himself in due course. If persecution may seem to result, that is no concern of the officers of justice. On the contrary, if they do not act, a grand jury might say, that, as the courts have passed the matter over, so will we.

CARRIERS OF GOODS—RIGHT OF TRANSFEREE OF "NOTIFY" SHIPMENT TO SUE FOR DELAY.—In McNeeley & Co. v. Lake Shore & M. S. Ry. Co., 115 N. E. 954, decided by Appellate Court of Indiana, it was held that where a shipment was made to shipper's order with direction to notify a certain person and bill of lading signed by shipper with draft on this person was attached and the draft was paid on the same day the goods arrived at their destination, no action existed in the drawee to sue the carrier for delay in transportation of the goods. There was judgment for the carrier and the drawee appealed.

The court said: "Numerous questions are discussed, the principal one of which is whether the appellant had such an interest in the property at the time of the alleged delay as will enable it to maintain this action for damages. Appellee contends that the evidence shows that appellant was neither the holder of the bill of lading nor the owner of the two automobiles when the alleged delay in shipment occurred; that without proof of one or the other of such facts there can be no recovery; that there is no evidence tending to prove either of such facts, but, on the other hand, the undisputed evidence shows that the bill of lading was made to the Studebaker Company with draft attached; and that the draft was not paid and the bill of lading obtained by appellant until the day the automobiles arrived in Evansville. Appellant contends that it was and is the real party in interest, and that by paying the draft and obtaining the bill of lading as above shown it

has the unquestionable right to maintain this suit for damages resulting from the unreasonable delay in shipment as alleged, and that it is otherwise entitled to recover under the evidence."

On the issue thus drawn it was ruled and a great number of cases are cited in support of the ruling in favor of appellee, the appellant not suing as assignee but in his own name as the primary party.

We have not examined the cases cited but, if they uphold the ruling, this runs the rule of technicality to an inordinate length. It is true, however, that no fatal obstacle is interposed to the drawee bringing the suit, if he applies to shipper to assign to him his cause of action. But just as the assigning is presumed to be the execution of a formal document to which no valid objection could be interposed, why should not the law presume it to have been done? When the carrier accepts a shipment of this kind is it not told by the shipper that all rights go to the party directed to be notified? And does not this familiar course of business imply this very thing?

The Carmack Amendment holds that a person beneficially interested is entitled to sue for injury or loss to goods though title passed to consignee on delivery to carrier. Norfolk S. Ry. Co. v. Trucking Exchange, 118 Va. 650, 88 S. E. 318. Therefore, if carrier is notified that one is contemplated to acquire interest he ought to be allowed to sue.

And under this amendment it has been ruled that any lawful holder of a bill of lading may sue for loss or damage to the goods. Carr v. Penna. R. Co. (Pa.), 96 Atl. 588.

And the assignee *or* transferee of a bill of lading may sue for breach of shipment contract. Conly v. Transf. Co. (Ga.), 85 S. E. 361. This does not require a separate assignment. See also Commission Co. v. Railroad, 262 Ill. 400, 104 N. E. 266.

If it is only under the Carmack Amendment that this suit might have been maintained, that is a very sensible change, and any rule clinging to other practice ought to be abolished by judicial construction. A business practice of sending bill of lading with draft attached in a shipment of this character is something of which courts should take judicial cognizance, and it seems not greatly to the credit of any carrier for it to interpose any such objection as did the appellee in this case. It is doubtful indeed whether an estoppel was not raised.

WHEN DO STIPULATIONS IN BUILDING CONTRACTS PRECLUDE THE BUILDERS' LIEN?

The subject of mechanics' liens is an important one to every contractor, builder and owner. Such liens are creatures of statute, and were unknown, either at common law or in equity.[1] They were allowed, however, by the civil law,[2] and in France by the Code of Napoleon, masons, architects, contractors and others employed in building houses, etc., were accorded liens.[3] The origin of such laws in America arose from the desire to establish and improve as rapidly as possible, the city of Washington. In 1791, at a meeting of the commissioners appointed for such purpose, both Thomas Jefferson and James Madison were present, and a memorial was adopted urging the general assembly of Maryland to pass an act securing to master builders a lien on houses erected and land occupied. The requested law was enacted December 19, 1791. The further history of the mechanics' lien law is concisely stated by a learned writer on that subject, as follows: "The next statute on the subject was passed by Pennsylvania in the year 1803. These statutes, while they contain the terms of all subsequent legislation on the subject, are imperfect and meager in comparison with the state of the law at the present time." "The whole subject has been one of gradual growth, extending from imperfect and limited enactments, embarrassed by adverse decisions, to be the settled policy of all the states, and of unquestioned importance. The experiment was at first confined to towns and cities, but has by degrees, as its necessity and justice became apparent, extended itself in a majority of the states, to agricultural districts. The lien was designed in its inception for the most part to secure only the

(1) Phillips. Mech. Liens (3d Ed.), Sec. 1.
(2) Domat's Civil Law by Strahan, Secs. 1741, 1742.
(3) Code Napoleon, Privileges and Mortgages, Sec. 2, Art. 2103.

principal contractor, until the frauds perpetrated upon subcontractors and workmen, gave rise to amendments for their proper protection." "Fortunately the system is gradually assuming perfection, and all those who are most entitled to the exercise of its beneficial provisions, compatible with the ownership of property and the paramount rights of the public, have been generally included within its principles. Each state has so guarded the remedy as to prevent, in a greater or less degree, the evils that would necessarily attend the indiscriminate multiplications of liens on real estate. The contractor seems to be universally secured by the lien.[4] In most of the states, the subcontractor and material men have either a lien given them directly on the land and building to secure them whatever may be due for their work and materials, or as in a majority of laws, a right to notify the owner of their unpaid claim for work on materials, with a right of lien against the property for any unpaid balance, which, at the service of the notice, may be in his hands and due to the contractor, or else simply a right of action, without the lien, against the owner of such unpaid balance. These same provisions are extended in some states to the workman."[5]

Mechanics' lien laws are remedial in their character and should be liberally construed, as to all persons coming within their provisions.[6] Although the courts must construe and enforce such statutes as remedial ones, they cannot extend them to meet cases not within their scope, however meritorious they may be.[7]

(4) For a leading case collecting the authorities on the question as to whether a contractor can have a lien under a law giving persons, laborers and material men. See Moore-Manfield Const. Co. v. Indianapolis, N. C. & T. Ry. Co. (Ind.), 101 N. E. 296.

(5) Phillips, Mech. Liens (3d Ed.), Secs. 7-36.

(6) Indianapolis, etc., Traction Co. v. Brennan, 174 Ind. 1.

(7) 2 Jones Liens (2d Ed.), Sec. 1554; Phillips, Mechanics' Liens (3d Ed.), Sec. 18-19; Boisot, Mechanics' Liens, Secs. 34-37.

A mechanics' lien may, of course, be waived by the voluntary act or agreement of the lienholder.[8] In order to constitute a waiver of a lien given by statute the contract must contain an express covenant against liens, or the language of the contract must be such that a covenant against liens can be clearly implied therefrom. The language upon this subject should not be ambiguous or uncertain, but it should be so clear that a mechanic or materialman may understand it without consulting a lawyer as to its legal effect.

It is therefore important that a builder know just what stipulations in his contract will take away his right to a lien. In the following cases the courts held that the wording of contracts precluded the builder from his lien. In Bowen v. Aubrey,[9] the contract contained the following agreement on the part of Aubrey: "Said first party hereby agrees he will not encumber or suffer to be encumbered said building or the lot on which it is erected, by any mechanics' liens or debts of material, labor men, contractors, sub-contractors, or otherwise." Aubrey sublet the brickwork to the intervener, Craft. In denying a lien, the Supreme Court of California held that as Craft knew that there was a contract between Aubrey and Bowen and that he was a sub-contractor under it, this was sufficient to put him upon inquiry and he is to be considered as effected with notice of the contents of the contract. Also, that the sub-contractor could not acquire any right against the owner in contravention of the terms of the original contract, and that a party may, by agreement, waive a right created by a statute for his benefit.

(8) Harris v. Youngstown Bridge Co., 93 Fed. 355; Portsmouth Iron Co. v. Murray, 38 Ohio St. 323; Griffin v. Booth, 152 Ill. 219; Hughes v. Lansing, 34 Oreg. 118, 55 Pac. 95, 75 Am. St. 574; Davis v. LaCrosse, etc., 12 Wis. 579, 99 N. W. 351; Carson-Payson Co. v. C. C. C. & St. L. Ry. Co. (Ind.), 105 N. E. 503.

(9) Bowen v. Aubrey, 22 Cal. 566.

In a Pennsylvania case,[10] a building contract provided that there should not be any lawful claims against the contractor in any manner from any source whatever for work or material furnished, and that the owner "will not in any manner be answerable * * * for any of the materials or other things used and employed in finishing and completing said works." It was there held, that such provisions constituted an implied covenant by the contractor that no lien should be filed against the building. A sub-contractor was chargeable with notice and was bound by all the stipulations of the original contract and not entitled to file a lien for the material furnished.[11]

In a Maryland case,[12] which concerned a contract for building houses, there was a stipulation therein that the contractor would give bond as a bar against liens upon such houses as were to be erected. In holding that the giving of such bond constituted a waiver of mechanics' liens, the higher court said, "If a party expressly contracts that he will not do a certain thing, or will not set up a certain claim against the other contracting party or his property by resort to a certain process, it seems to us a legal anomaly to say he can go on and do the thing, or avail himself of the forbidden process, because he has a grievance against such other party on some other ground, or a claim which he can enforce against him by a different suit or process.[13]

In an Indiana case[14] the contract provided that the appellant would keep the buildings and real estate upon which they were located free and clear of all mechanics' liens on account of any work, labor, or materials furnished by said party of the second part. It was claimed by the contractor that this stipulation amounted only to an agreement to keep the property free and clear of liens in favor of persons who might perform labor for or furnish material to him as a subsequent contractor, and that it does not preclude him from enforcing a lien in his own favor for the balance due him under the contract. The Appellate Court in deciding the case said, "The contract is not susceptible of the construction for which appellant (contractor) contends. Appellant's agreement was to keep the property free of liens on account of labor and materials which it furnished. It agreed to furnish all labor and materials necessary for the completion of the contract, and the furnishing of such labor and material would create a liability, in favor of appellant under the contract, for which it might have enforced a lien in the absence of the agreement to keep the property free and clear of liens on account of labor and material furnished by the party of the second part. By filing a lien for a balance due on the contract for labor and material furnished thereunder, appellant clearly violated the stipulation of the contract to which we have referred."[15]

As we have before suggested, the greatest difficulty which attends the solution of the present question is the determination of just what language will be

(10) Dersheimer v. Maloney, 143 Pa. St. 532, 22 Atl. 13.

(11) See also Evans v. Grogan, 153 Pa. St. 121, 25 Atl. 804; Schroeder v. Galland, 134 Pa. St. 277, 19 Atl. 632, 7 L. R. A. 711, 19 Am. St. 691; Long v. Caffrey, 93 Pa. St. 526; Scheid v. Rapp, 121 Pa. St. 593, 15 Atl. 652; Fidelity Mut. L. Assn. v. Jackson, 163 Pa. 208, 29 Atl. 883, 43 Am. St. Rep. 789; Ballman v. Heron, 160 Pa. 377, 28 Atl. 914.

(12) Pinning v. Skipper, 71 Md. 347, 18 Atl. 659.

(13) In this case it was claimed that the breach of the contract by the owner avoided the express waiver of the lien. See the following cases, holding similar to Pinning case: Purvis v. Brumbaugh's Estate, 8 Pa. Super. Ct. 292; Long v. Caffrey, 93 Pa. 528; Boisot on Mechanics' Liens, Sec. 744; 27 Cyc. 266; contra, Kertscher & Co. v. Green, 205 N. Y. 522, 99 N. E. 146, Am. Cas. 1913 E, 561.

(14) Carson-Payson Co. v. C. C. C. & St. L. Ry. Co. (App.) 105 N. E. 503, followed in Fuhrman v. Frech (App.) 109 N. E. 781.

(15) It is not the purpose of this article to discuss the question as to whether the materialman and laborer are bound by the stipulation in the original contract against liens. See the authorities discussed in Hume v. Seattle Dock Co. (Ore.), 137 Pac. 752, 50 L. R. A. (N. S.) 153.

deemed a waiver of liens. In the following cases, the language there used was not deemed a waiver of the statutory lien. In a leading New York case[16] the court held that a contractor could not be held to have contracted with reference to his own lien when he agreed to a stipulation in the contract that he would not at any time suffer or permit any lien to be put or remain on the premises for work or materials, or by reason of any other claim or demand, and that any such lien of a third party, until it should be removed, should preclude any claim for payment whatever under the contract, and that in the event that the same was not removed, the owner might remove the same at the contractor's expense. In the course of the opinion, the court said, "As we construe the provisions of the contract, the paragraph quoted referred only to liens, filed against the contractor by workingmen, sub-contractors, or material men. This is apparent not only by the language, 'or by reason of any other claim or demand against the party of the second part,' the word 'other' showing that the claims antecedently mentioned were to be of the same character, that is to say, against the contractor, but by the further provision that the owner might remove any lien at the expense of the contractor, including legal fees,—a provision quite inapplicable to a lien filed by the contractor itself. Moreover, to preclude a contractor by virtue of some provision, to that effect, in the contract, from his right to the security which the statute affords him, the intent and intepretation of the provision should be reasonably clear. There are many reasons why an owner might wish to be free from the claims of sub-contractors and materialmen against the principal contractor which might involve him in expensive litigation and the possibility of loss, should a payment to the principal contractor be deemed to have been improperly made as against the lienors. Those reasons are without force to a lien filed by the principal contractor."

In a Wisconsin case,[16a] the contract stipulated that the contractor should deliver the buildings "free from all claims, liens and charges" on or before November 1, 1900." The court after stating that as a general proposition a builder may waive his right to a lien remedy, remarks that where the terms of a contract are ambiguous on that question, then the doubt should be resolved against the waiver, since it would be presumed in the absence of clear evidence to the contrary, that one has not disabled himself from the use of so valuable a privilege as that given by the statute for the enforcement of a builder's rights. In its opinion the court said, "Our construction of the language of the contract is that it called for a delivering of the building free from any lien or claim for a lien through or under the builder. It could not reasonably have had reference to any liens filed by the builder, because, the contract contemplated the probable lapse of time for making the last payment, after the completion of the building—time sufficient to enable the architect to determine whether there were any liens, claims or charges thereon. It was contemplated that there would be nothing due him till the happening of conditions precedent, which might not occur till after the day of delivery. Such was the case. The building was delivered before respondents had any cause of action against appellant. There was no lien on file at the time of the delivery, nor for some time thereafter, nor was there, so far as appears, any claim that might ripen into a lien, except that of respondents. It is considered that it was not intended by the parties to the contract, that respondents should not have the statutory lien remedy to enable them to collect any sum that might be in the end due them, and payment

(16) Ketscher & Co. v. Green, 205 N. Y. 522, 99 N. E. 146, Am. Cas. 1913 E, 561.

(16a) Davis v. LaCrosse, etc., 12 Wis. 579, 99 N. W. 351.

of which they might be compelled to enforce by action."

In a Massachusetts case,[17] which involved the construction of a contract for the erection of a dwelling house, the contract had the following provisions: "Desmond agrees to pay to the said Poirer, upon certificate of said architect that the terms of this contract are complied with, and upon sufficient evidence, that all claims upon the building for work or materials up to the time of payment are discharged, the sum of $1,575.40, in the following manner. 3d. Thirty days after the work is entirely completed and accepted by the architect he, the said architect, having signed a certificate to that effect, the balance, $575.40 is to be paid. In case notice in writing is given to the said Desmond by any person furnishing stock or materials for the construction of the work under contract, that they shall claim a lien for said stocks and materials, no payment shall be made until such notice shall be revoked by the person serving the same." It was held that the contractor was not deprived of his lien. The court in its opinion said: "It is to protect the respondent from a liability under liens, after making full payment for the work and material to the contractor. There is no reason for such a provision in reference to the claims of the contractor to be paid under the contract. There being no other liens than him, payment to him of the amount due under the contract would leave the property free from all liens or claims, and accomplish the purpose of this provision. There is no reason for depriving the contractor of his right to secure the amount which the respondent by the contract, agrees to pay him, and without something looking to such an object he cannot be cut off from the right given by the statute."

In a Rhode Island case,[18] petitioners contracted to construct a building and gave bond for the performance of their contract, also conditioned to save the owners harmless "from any and all mechanics' liens in any manner arising from or growing out of said contract." In construing the contract the higher court held that the bond covered only liens for work done and materials furnished for petitioners by laborers, sub-contractors, or material men and did not embrace liens which the law might give to the contractor.

In a recent Texas case,[19] it was held that the principal contractor's lien, at least to the extent of the contract price, was not affected by a provision that the contractor would not allow any mechanics' liens for labor or material, and would satisfy every claim therefor, and hold the owners harmless from all liens in respect thereto. Mr. Rockel in his excellent treatise on Mechanics' liens, says: "A general provision that a contractor is to deliver buildings free from liens is not a waiver of his own right."[20]

A builder's right to a mechanics' lien may also be waived in some cases, by inconsistent acts, although he may have had, in fact, no intention to waive it, but the intent of the parties is usually controlling. The rule is thus stated in a recent case: "It may be admitted that lien laws do not, in general, create a lien in favor of one who accepts in full a different security at the time the contract or agreement is made, or who has entered into any other agreement which manifestly indicates a clear purpose and intention to waive the benefit of the statutory lien. A contract for a security which

(17) Dolphis Poirer v. Thomas F. Desmond, 177 Mass. 201.

(18) Bassett v. Swarts, 17 R. I. 215, 21 Atl. 352.

(19) Childress v. Smith (Tex.), 37 S. W. 1076, reversed on other grounds in 90 Tex. 610, 38 S. W. 518, 40 S. W. 389.

(20) Rockel on Mechanics' Liens, Sec. 173. See the following authorities generally upon this subject: Simonson v. Grant, 36 Minn. 439; Schmid v. Palm Garden Improv. Co., 162 Pa. 211, 29 Atl. 727; Jarvis v. State Bank, 22 Colo. 309, 55 Am. St. Rep. 129, 45 Pac. 505; Asle v. Wilson, 14 Colo. App. 323, 59 Pac. 846; Commonwealth Tile Ins. & T. Co. v. Ellis, 192 Pa. 321, 73 Am. St. Rep. 816, 43 Atl. 1034; Iseman v. Fugate, 36 Mo. App. 166; Frost v. Folgetter, 52 Neb. 692, 73 N. W. 12; Arizona R. Co. v. Globe Hardware Co., 14 Ariz. 397, 129 Pac. 1104.

is inconsistent with the intentions that a mechanics' lien should exist will be held, generally as a waiver of the statutory lien, but it is well settled that though the owner obligates himself to give a security inconsistent with the intention that a mechanics' lien should exist, or where the contract is to pay in land, or other specified article of property, yet if the owner fail to fulfill the agreement for such mode of payment, or for different security, it will not be taken as an agreement to waive the mechanics' lien in case payment is not made in the manner provided for, or the security is not given according to the obligation of the owners."[21] According to this rule taking a mortgage or other security may operate as a waiver of the lien[22] but it does not necessarily do so unless such was the intention of the parties[23] and as between the parties themselves the presumption will be indulged, in the absence of anything to the contrary, that the lien was not intended to be waived unless the conditions of the contract as to the security or manner of payment are performed.[24]

In a United States Supreme Court decision, in discussing the question of waiver the court said: "If the labor has been performed, or the materials furnished, no matter in what the owner agreed to pay, if he has not paid in any way, the laborer or mechanic has a right to resort to the security provided by law, unless the rights of third parties intervene before he gives the required notice. Liens of the kind, except where the statute otherwise provides, arise by the operation of law, independent of the express terms of the contract in case the stipulated labor is performed, or the promised materials are furnished; the principle being that the parties are supposed to contract on the basis that if the stipulated labor is performed, or the promised materials are furnished, the laborer or material man is entitled to the lien which the law affords, provided he gives notice within the specified time.[25]

The doctrine of estoppel may, however, prevent a lien holder from enforcing his lien against innocent third persons whom he has misled. This is generally true when he purposely conceals the fact that he is entitled to a lien and induces others to act, to their injury, upon the belief that he has no such right, or represents that he has been paid, or the like, so that the assertion of the lien upon his part would operate as a fraud upon innocent third persons.[26]

Huntington, Ind. SUMNER KENNER.

(21) Central Trust Co. v. Richmond & R. Co., 68 Fed. 90, 41 L. R. A. 458.

(22) Willison v. Douglas, 66 Md. 99, 6 Atl. 530; Picket v. Bullock, 52 N. H. 354; Barrows v. Boughman, 9 Mich. 213; Gorman v. Sagner, 22 Mo. 137.

(23) Union, etc., Bank v. Baker, 42 Neb. 880, 61 N. W. 91; Chapman v. Brewer, 43 Neb. 890, 62 N. W. 320, 47 Am. St. 779; Gilchres v. Gottschalk, 39 Iowa 311; Taleaferro v. Stevenson (N. J.), 33 Atl. 383; Maryland, etc., Co. v. Spilman, 76 Md. 337, 25 Atl. 297, 17 L. R. A. 599, 35 Am. St. 431.

(24) See review of authorities in note to Kilpatrick v. Kansas City, etc., R. Co., 41 Am. St. 741.

(25) McMurray v. Brown, 91 U. S. 257.

26) Hinchley v. Greany, 118 Mass. 595; Chapman v. Hamilton, 19 Ala. 121; McGraw v. Bayard, 96 Ill. 146; Scott v. Orbison, 21 Ark. 202; Howard v. Tucker, 1 B. and Ad. 712; West v. Klotz, 37 Ohio St. 420; Bristol, etc., Co. v. Bristol, etc., Co., 99 Tenn. 371; 42 S. W. 19.

PRINCIPAL AND SURETY—CONTRIBUTION.

FREW et al. v. SCOULAR.

Supreme Court of Nebraska. April 14, 1917.

102 N. W. 496.

(Syllabus by the Court.)

A surety in whose favor the statute of limitations has not run, who has done nothing to suspend its operation, and who has been compelled to pay the debt of his principal may exact contribution from a cosurety in another state, though under the laws thereof the creditor's claim against the latter was barred when the principal's debt was paid.

ROSE, J. This is an action for contribution between sureties. It is alleged in the petition that April 17, 1894, George Scoular, William

Frew, Thomas Donald, and Janet Scoular, as sureties, and Robert and William Scoular, as principals, executed a bond for the payment of a loan of £1,500. The bond matured May 15, 1894, and was secured by a mortgage on land in Scotland, where all the parties resided except defendant, a resident of Nebraska. It is also alleged that the principals in the bond became insolvent, that the incumbered land was sold in satisfaction of prior liens, and that in 1912, William Frew and the trustees of the estate of Thomas Donald, plaintiffs herein, were compelled to pay the debt. It is alleged further that the laws of Scotland do not bar an action on the bond before 40 years. The suit is brought against George Scoular to compel contribution in the sum of $2,999, his alleged liability as one of three solvent sureties. Defendant pleaded that he signed the bonds in Nebraska, that he was then, and has since been, a resident thereof, and that the action is barred here by the statute of limitations—a five-year period. Rev. St. 1913, § 7567. Defendant also pleaded that he was not a surety, but that he signed the bond under an agreement to merely release any inheritable interest he might have in the mortgaged land. The trial court directed a verdict for plaintiffs, and from a judgment in their favor for $3,018.12, defendant has appealed.

(1) Should defendant's plea of the statute of limitations be sustained? The question may be stated thus: May a surety in whose favor the statute of limitations has not run, who has done nothing to suspend its operation and who has been compelled to pay the debt of his principal, exact contribution from a co-surety in another state, though under the laws thereof the creditor's claim against the latter was barred when the principal's debt was paid? While the decisions appear to be in conflict, the better reason and the weight of authority seem to support the rule requiring contribution. Camp v. Bostwick, 20 Ohio St. 337, 5 Am. Rep. 669; Wood v. Leland, 1 Metc. (Mass.) 387; May v. Vann, 15 Fla. 553; Crosby v. Wyatt, 23 Me. 156; Crosby v. Wyatt, 10 N. H. 319; Martin v. Frantz, 127 Pa. 389, 18 Atl. 20, 14 Am. St. Rep. 859; Aldrich v. Aldrich, 56 Vt. 324, 48 Am. Rep. 791; Wolmershausen v. Gullick, 2 L. R. (1893) Ch. Div. (Eng.) 514.

In Camp v. Bostwick, 20 Ohio St. 337, 5 Am. Rep. 669, it was contended, as in the present case, that, since the statute of limitations had barred an action by the creditor against the defendant before the plaintiff paid the debt, defendant received no benefit from such payment and was not liable for contribution. In answer to this argument the court said:

"If the right of a co-surety to claim contribution rested upon the doctrine of subrogation to the rights of the creditor, the proposition might be true. The doctrine of subrogation has its origin in the relation of principal and surety, whereby a surety who pays the debt of his principal is, in equity, substituted in the place of the creditor, and is entitled to all the rights which the creditor may have against his principal. But the doctrine of contribution has its origin in the relation of co-sureties or other joint promisors in the same degree of obligation. It is not founded upon the contract of suretyship. [Russell v. Failor] 1 Ohio St. 327 [59 Am. Dec. 631], and 1 Cox, 318. It is an equity which springs up at the time the relation of co-sureties is entered into, and ripens into a cause of action when one surety pays more than his proportion of the debt. [Wayland v. Tucker] 4 Grat. Va. 268 [50 Am. Dec. 76]. From this relation the common law implies a promise to contribute in case of unequal payments by co-sureties. But equity resorts to no such fiction. It equalizes burdens and recognizes and enforces the reasonable expectations of co-sureties because it is just and right in good morals, and not because of any supposed promise between them. This equity, having once arisen between co-sureties, this reasonable expectation that each will bear his share of the burden is, as it were, a vested right in each, and remains for his protection until he is released from all his liability in excess of his ratable share of the burden. Neither the creditor, the principal, the statute of limitations, nor the death of a party, can take it away."

Defendant argues that the Ohio case is based upon Wood v. Leland, 1 Metc. (Mass.) 387, a suit in equity which must be distinguished, contribution now being a legal remedy to which the statute of limitations should be applied. The argument is not conclusive. The question is not whether the statute of limitations runs against a surety's claim for contribution, but when does the cause of action for contribution accrue? Ordinarily the statute of limitation does not commence to run until the cause of action accrues. The right of a surety to contribution does not arise until he has paid more than his proportion of the debt or until his liability has been determined by judgment. May v. Vann, 15 Fla. 553; Wolmershausen v. Gullick, 2 L. R. (1893) Ch. Div. (Eng.) 514; Ex parte Snowdon, 17 L. R. Ch. Div. (Eng.) 44. Upon this point most of the cases cited by defendant appear to be distinguishable Cochran v. Walker's Ex'rs, 82 Ky. 220, 56 Am. Rep. 891, and Shelton v. Farmer, 9 Bush (Ky.) 314, are decisions under local statutes modifying the general rule. Lovell v. Nelson, 11 Allen (Mass.) 101, 87 Am. Dec. 706, and Spelman v. Talbot, 123 Mass. 489, rest upon special statutes relating to claims against the estates of deceased persons, but recognize the general rule announced in Wood v. Leland, 1 Metc. (Mass.) 387. Stockmeyer v. Oertling, 35 La. Ann. 467,

without discussions follows Ledoux v. Durrive, 10 La. Ann. 7, and neither case involves the statute of limitations. Turner's Adm'r v. Thom, 89 Va. 745, 17 S. E. 323, appears to be a case where payment by the plaintiff was voluntary; the statute of limitations having run in favor of both sureties. Stone v. Hammell, 83 Cal. 547, 23 Pac. 703, 8 L. R. A. 425, 17 Am. St. Rep. 272, is a case where the plaintiff by absence from the state had suspended the operation of the statute. McLin v. Harvey, 8 Ga. App. 360, 69 S. E. 123, without any discussion of the principles underlying contribution, and Screven v. Joyner, 1 Hill Eq. (S. Car.) *252, 26 Am. Dec. 199, announce the rule urged by defendant herein, but the reasoning is not convincing. The action for contribution was not barred by the statute of limitations.

(2) The trial court excluded testimony tending to show that defendant signed the bond at the request of his brother, one of the principals therein, and that it was agreed between them and the obligee that defendant was merely releasing whatever inheritable interest he might have in the incumbered land, and that plaintiffs knew defendant was not to be held as a surety. This is not an action on the bond, but a suit between sureties to enforce contribution. Evidence was therefore admissible to show the actual relation of the parties to the bond. 4 Wigmore, Evidence, §§ 2444, 2445; Chapman v. Garber, 46 Neb. 16, 64 N. W. 362; Cox v. Ellsworth, 97 Neb. 392, 150 N. W. 197; Oldham v. Broom, 28 Ohio St. 41; Chapeze v. Young, 87 Ky. 476, 9 S. W. 399; Leeper v. Paschal, 70 Mo. App. 117; Shea v. Vahey, 215 Mass. 80, 102 N. E. 119; Enterprise Brewing Co. v. Canning, 210 Mass. 285, 96 N. E. 673; Bulkeley v. House, 62 Conn. 459, 26 Atl. 352, 21 L. R. A. 247. In the case last cited it was said:

"In considering the questions involved it should be borne in mind that this is an action for contribution. Contribution does not rest upon contract, but on the broad equitable principle that equality is equity. Justice and fair dealing demand that where one or more parties sign the same obligation and become equally obligated in precisely the same degree thereby, and stand upon the same footing as to their liabilities thereunder, one of the number shall not be compelled to assume the whole burden for his associates, but may compel them to share equally with him any loss that may occur as the result of their joint liability. In actions for contribution, therefore, the principle seems now to be well established that parol evidence is admissible to show the true relations existing between the several parties bound by a written obligation. * * * Such evidence is not offered to contradict or vary the contract contained in the writing, but simply to show the actual relations subsisting between the joint makers of the note and the real nature of the contract between them. Such facts are not a part of the contract and do not affect its terms, but are wholly collateral to it. To support his claim for contribution, therefore, the plaintiff clearly had the right to show his true relations to the note, and this without regard to the knowledge of the defendant."

If defendant was not one of the sureties, he is not liable for contribution. The trial court therefore erred in excluding evidence on this issue.

It follows that the judgment is reversed, and the cause remanded for further proceedings.

Reversed and remanded.

DEAN and CORNISH, JJ., not sitting.

NOTE.—*Surety Paying Debt Not Barred Where Payable, but Barred Where Suit is for Contribution.*—Taking it to be true that the *lex fori* governs the remedy in the jurisdiction where a defendant is sued and that a surety's right of action for contribution accrues from the time he pays more than his share, is it true that, if he pays a debt not barred in a jurisdiction where paid, but barred in the state where he sues for contribution that the *lex fori* governs the right to recover.

The instant case does not discuss this question, but an opinion concurring in reversal, but claiming the action should have been dismissed and not remanded, does.

Payment of a debt by a surety after the bar of the statute attaches gives no right to contribution. Cocke v. Hoffman, 5 Lea (Tenn.) 105, 40 Am. Rep. 23; Cochran v. Walker's Exrs., 82 Ky. 220, 56 Am. Rep. 891; Stockwell v. Mutual L. Ins. Co., 140 Cal. 198, 73 Pac. 833.

The rule is well expressed in Turner's Admr. v. Thom, 89 Va. 745, 17 S. E. 323, where it is said: "To entitle one joint obligor to recover from his co-obligor money paid by him in excess of his proportion, the payment must have been made upon a debt for which the latter was legally liable at time of the payment and which the obligor paying was compellable to pay, and not upon a debt that was barred as to the obligor sought to be charged." While this statement is a little involved, yet as obligor and co-obligor were both residents of the same jurisdiction and the bar in favor of one was the bar as to the other the point we have in mind was not in the court's mind. But the question primarily was the compulsion to pay which gave the right to sue for contribution. If that is sufficient, it would make no difference that as to a non-resident surety the debt was not enforceable against him.

In Stockmeyer v. Oertling, 35 La. Ann. 467, the ruling was that: "The party from whom contribution is demanded must himself have been under a legal obligation to pay at the time payment was made by him who demands the contribution." Taking these words at their face value and we perceive that the stress upon the paying surety is not so much considered as whether there was liability upon the other to pay. But this is but stating the proposition another way around without thinking of the distinction sought. It appears in this case that payor and the other were of the same state.

The same criticism may be made of many other cases in which the proposition is stated, whether

regarding the payor being bound or the other from whom he is seeking contribution. This concurring opinion cites several cases, but they do not appear to us in their general statement to exclude the point here suggested.

It has been said that the contract for contribution between sureties is implied by law for mutual protection and indemnity and if this is so and a cause of action arises in favor of one who pays at the time he pays under compulsion, the compulsion gives right of recovery from the others, and that they lived where they could not be compelled to pay, because there the original contract was not enforceable against them, is but an incident immaterial in the implied contract. We think, if they waived non-enforceability and paid they could sue one who could have been made to pay.

In Hard v. Mingle, 206 N. Y. 179, 99 N. E. 542, 42 L. R. A. (N. S.) 1131, it was held that: 'The right of action (by the paying surety) grows out of the original implied agreement arising out of there being co-sureties, that if one shall be compelled to pay the whole or a disproportionate part of the deal, for which both thus collaterally and provisionally stipulate to be liable, the other will pay such a sum as will make the common burden equal." Here it is seen all thought of limitations as to the original agreement is swallowed up in the new payment by one liable to pay, and how a statute of repose merely could change this equitable obligation it is not clearly conceivable. The repose given is personal—the implied obligation to protect is in favor of the other party.

C.

CORRESPONDENCE

RIGHT OF COURTS TO DECLARE AN ACT OF CONGRESS UNCONSTITUTIONAL.

Editor, Central Law Journal:

The letter of Hon. Charles B. Little, of Scranton, Pa., on page 388 of the Central Law Journal of May 25th, calls to mind the article of Mr. Preston A. Shinn in the issue of the Journal for May 11th, taking issue with Judge Walter Clark, of the Supreme Court of North Carolina on Justice Clark's claim that the Supreme Court of the United States has no authority to declare an act of Congress to be unconstitutional.

I am wholly in accord with Mr. Little and Mr. Shinn and wish to make a suggestion or two in addition to what they have to say in their two communications.

It seems from Mr. Shinn's communication that Justice Clark's article has been printed by the United States Senate and thus made a public document so as to be distributed over the country under the frank of some Senator or Congressman. What Justice Clark has to say is fully and completely answered by the article of Senator O'Gorman in Senate Document No. 454 of the Sixty-fourth Congress, First Session, the title being: "Duty of Courts to Refuse to Execute Statutes in Contravention of Law;" and, is also fully met by Senate Document No. 941, Sixty-third Congress, Third Session, being a report of the New York State Bar Association on the same subject. I have called attention to these two documents for the reason that they go into a great deal of detail on the subject—that of the New York State Bar Association particularly, as it shows a large number of cases, not only in the United States and in the thirteen Colonies previous to the adoption of the Constitution of the United States, but also in England and in the English Colonies, where acts of Parliament and of the Colonial Legislatures, have been held to be void as being contrary to the constitutional rights of Englishmen.

In this connection permit me to call attention to one decision of a Colonial court in February, 1766, holding the Stamp Act of Parliament to be unconstitutional, which case has not been mentioned in any of these lists I have named, but which is to be found in Volume 5, on pages 394 and 395, of McMaster's "History of the People of the United States." McMaster says therein:

"The majority of the Colonies for years before the quarrel with the mother country had seen their laws disavowed at pleasure by the king or queen in council. They had, therefore, become used to the idea of the existence of a body that could set aside a law enacted by a legislature and approved by a governor. They were used to written charters and frames of government and were accustomed to appeal to them as the source of all authority under the king. When, therefore, in their quarrel with the mother country it became necessary to find some reason for resisting the Stamp Tax, the colonists appealed to a written document, and declared the tax law invalid because it violated the provisions of Magna Charta.

"Indeed, it is in this connection that one of the early nullifying decisions was made by a court. One day in February, 1766, the clerk and other officers of the Court of Hustings for Northampton County, Virginia, appeared before the bench and moved for opinion on two questions: Was the law of Parliament imposing stamp duties in America binding on Virginia? Did they, as officers of the law, incur any penalty by not using stamped paper? The judges were unanimously of the opinion that the law did not bind, affect, or concern, the inhabitants of Virginia, 'inasmuch as they conceived the act to be unconstitutional.'"

The author, Prof. McMaster, in a letter to me dated February 15th, 1901, cited as his authority for this reference to the Court of

Hustings decision, to the Pennsylvania Journal of March 13th, 1766, the date of publication of the decision being about a month after the decision was rendered.

The question being one of considerable interest to me, I wrote to the clerk of the Court of Hustings of Northampton County, asking if the record still showed such ruling of the court, and the then clerk, R. W. Nottingham, in his answer dated May 24th, 1901, said:

"The court records for this county begin January, 1632, and are complete up to the present date and are in my custody as clerk. I find the order referred to in your letter clearly stated and is to be found in Minute Book No. 27, page 29."

The fact of the County Court of Northampton County entering this formal judgment in February, 1766, more than ten years prior to the Declaration of Independence, taken in connection with such rulings on the part of other Colonial courts, shows conclusively to me that the question was not a new one and such rulings of the courts were well-known to the members of the Constitutional Convention of 1787.

As for the misrepresentation of fact made by Justice Clark and the Oklahoma orators, claiming the courts to be usurpers in this respect, the proper term to be applied is better understood than expressed. Yours truly,

G. B. JENNINGS.

Shenandoah, Iowa.

BOOKS RECEIVED.

Criminal Sociology. By Enrico Ferri, Professor of Law in the University of Rome, Deputy in the Italian Parliament, etc. Translated by Joseph I. Kelly, late Lecturer on Roman Law in Northwestern University; and John Lisle, late Member of the Philadelphia Bar. Edited by William W. Smithers, of the Philadelphia Bar. With introductions by Charles A. Ellwood, Professor of Sociology in the University of Missouri, and Quincy A. Myers, former Chief Justice of the Supreme Court of Indiana and former President of the Institute of Criminal Law and Criminology. Price, $5.00 net. Boston. Little, Brown & Company, 1917. Review will follow.

United States Statutes Annotated. Editor-in-Chief, Bruce Barnett, of the Kansas City, Mo., Bar. Associate Editors, William E. Shirley, Dayle C. McDonough, Myron Witters, Samuel E. Swiggert, Joseph E. Brown, L. C. Harper, John Parry and Paul Barnett. In ten volumes. Volumes 1, 2, 3 and 4 received. Chicago. T. H. Flood & Company, 1916. Review will follow.

HUMOR OF THE LAW.

In the Bureau of Census at Washington acts against the law are recorded under a few general heads, such as murder, burglary, etc.

An officer of the bureau tells of a woman clerk who was puzzled by an entry she encountered in one of her slips. The crime as set down was, "Running a blind tiger." After due reflection, the woman placed it under the head, "Cruelty to Animals."

"Prisoner at the bar, will you be tried by jury or by the court?"

"By the jury, your honor—by the jury."

"Humph! Why—er—haven't I seen you before somewhere?"

"Yes, your Honor. I sell you ice in summer and do your plumbing in winter."

Several years ago it devolved upon A. L. Shapleigh to introduce Secretary of the Treasury William G. McAdoo at a banquet in St. Louis.

After a rather flustered, brief speech, Mr. Shapleigh assembled his oratorical guns in his climax:

"And now I have the honor to introduce the great Cabinet officer, Hon. James A. McAdoo," he said.

"It seems to me," whispered Judge Moses N. Sale, "that Shapleigh has been in the hardware business long enough to know a billy from a jimmy."—St. Louis Republic.

Geordie had a small dog, and was summoned for keeping a dog without a license. He pleaded it was only a pup.

"How old do you say he is?" asked the magistrate's clerk.

"Aa divven knaa exactly," replied Geordie, "but he's onny a pup."

Expert evidence, however, proved it to be a dog and Geordie was duly fined. As Geordie was leaving the court, he turned to his wife and remarked:

"Hang me if Aa can understand it. Aa said the seym thing last year, and the year before, and they let me off. Noo they fine me. Aa suppose somebody's been meesin' aboot with the law!"—Newcastle (Eng.) Chronicle.

WEEKLY DIGEST

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co. St. Paul, Minn.

1. **Adverse Possession** — Cutting Timber.—Mere felling or cutting timber on land would not in itself constitute adverse possession as against the true owner, but such acts when done for the purpose of clearing the land to permit use for farming purposes and as a home may show adverse possession.—Brown v. Fisher, Tex., 193 S. W. 357.

2.——Statute of Limitations.—One has title under the five-year statute of limitations, having had of record a deed properly describing the land and having paid the taxes for five years, with a tenant on the land for such time under a lease contract covering the entire tract.—Durham v. Houston Oil Co. of Texas, Tex., 193 S. W. 211.

3. **Attorney and Client**—Good Moral Character.—Where an attorney concealed from the court his former applications for admission to practice, withdrawn on account of objections to his moral character, he committed a fraud upon the court, and did not possess the necessary "good moral character."—In re Wills, Colo., 163 Pac. 657.

4.——Suspension.—Under Rem. Code 1915, §§ 129, 139, an attorney who published a pamphlet of and concerning a judge sitting in court, imputing to him larceny, malfeasance, and graft, was properly suspended.—State v. Willis, Wash., 163 Pac. 737.

5. **Bankruptcy**—Act of.—Failure of an insolvent to discharge a lien, obtained through judicial proceedings more than four months prior to bankruptcy proceedings, held not an act of bankruptcy, although the time fixed for sale of the property was within the four months period.—In re Superior Jewelry Co., U. S. D. C., 239 Fed. 373.

6.——Barred Claim.—The promise arising from payment by bankrupt on a barred claim is an "incumbrance," which being made within four months of bankruptcy, proceedings with intent to defraud any creditors are declared void by Bankr. Act, § 67e.—In re Salmon, U. S. D. C., 239 Fed. 413.

7.——Option.—Holder of an option from a bankrupt for the purchase of land held entitled to specific enforcement by the bankruptcy court on an offer to pay sufficient to satisfy all claims against the estate and costs.—Dunlop v. Baker, U. S. C. C. A., 239 Fed. 193.

8.——Preference.—Whether a debt, to secure which a lien was created within four months of bankruptcy, was a pre-existing debt, within Bankr. Act, § 60, must be determined as of the date of the creation of the lien.—In re Mossler Co., U. S. C. C. A., 239 Fed. 262.

9.——Rent.—The lessor cannot claim from the receiver in bankruptcy of his lessee reasonable rental for the premises during the period prior to the commencement of the term during which the lessee was to have possession, rent free.—In re Budd, U. S. C. C. A., 239 Fed. 307.

10.——Stockholder.—A stockholder of a Minnesota corporation is liable for the difference between the par value of his stock and the agreed amount he paid therefor only to those giving credit on the capital stock, notwithstanding Gen. St. Minn. 1913, § 6193, and such liability cannot be enforced by the trustee in bankruptcy.—Courtney v. Choxton, U. S. C. C. A., 239 Fed. 247.

11.——Taxes.—An agreement between the buyer of personal property and the receiver in bankruptcy that the real estate would sell for a certain figure, with unaccrued taxes in addition, held not to require the buyer, on purchasing the property for more than the sum of the agreed figure and the unaccrued taxes, to pay the taxes in addition to his bid.—In re Reading Hat Mfg. Co., U. S. D. C., 239 Fed. 357.

12.——Wages.—One who had been employed by a bankrupt corporation as its president and manager, but whose duties as such were merely nominal, his principal duties being those of clerk and salesman, is entitled to a preference for his claim for wages.—In re Capital Paint Co., U. S. D. C., 239 Fed. 424.

13. **Banks and Banking**—Forged Check.—The doctrine that a drawee bank which paid a forged check cannot recover the amount thereof under Negotiable Instruments Act, § 62, applies only in favor of one who was a bona fide holder for value of the forged check.—Figuers v. Fly, Tenn., 193 S. W. 117.

14.——Patented Article.—Note given for purchase price of patented article must, under Kir-

by's Dig., § 513, be on a printed form, showing purpose for which given, and is otherwise void; but to defeat collection, the note not being produced, the maker must show that it did not follow the form of the statute.—Jaggers v. Sparks, Ark., 193 S. W. 67.

15.——Set-Off.—A bank's right to apply a deposit in payment of a debt is referable to principles of equity, as well as statutory set-off provisions.—Moore v. Greenville Banking & Trust Co., N. C., 91 S. E. 793.

16.——Stamped Indorsement.—A stamped indorsement on a check payable to a bank other than that on which it was drawn, guaranteeing indorsements, goes no further than a blank indorsement, and does not warrant to the drawee bank the genuineness of the signature of the maker of the check.—Figuers v. Fly, Tenn., 193 S. W. 117.

17.——Surety.—President of corporation who writes his name on back of its note, at inception, before delivery, for accommodation of corporation, is surety and not indorser.—Houston Transp. Co. v. Paine, Tex., 193 S. W. 188.

18. **Bills and Notes**—Evidence.—Mere nonpayment of interest after maturity does not of itself show a note dishonored, but is of some weight in determining the purchaser's good faith.—Shultz v. Crewdson, Wash., 163 Pac. 734.

19.——Ultra Vires.—An innocent purchaser, without notice of the purpose for which notes given by authority of a corporation were issued, may recover, though the notes were ultra vires.—Galveston-Houston Interurban Land Co. v. Dow, Tex., 193 S. W. 353.

20. **Brokers**—Implied Agreement.—Though a principal appointing a sales agent for particular territory reserved to itself the right to sell in that territory, held, that there was an implied agreement not to interfere with pending negotiations of the agent.—American Locomotive Co. v. Harris, U. S. C. C. A., 239 Fed. 234.

21. **Carriers of Goods**—Carload Lots.—Allowance by Acts 1907, p. 456, § 2, to a railroad of 24 hours extra for forwarding freight "at each point where transferring from one railroad to another or rehandling of freight is involved" applies to a shipment by carload lot at a division point at which car is changed from one train to another.—Chicago, R. I. & P. Ry. Co. v. Consumers' Coal Co., Ark., 193 S. W. 93.

22.——Demurrage.—Interstate carrier may exact demurrage charges on private cars detained on carrier's tracks while in railroad service.—Swift & Co. v. Hocking Valley Ry. Co., U. S. S. C., 37 S. Ct. 287.

23.——Indemnity Bond.—A carrier cannot relieve itself of its liability on its bill of lading to the shipper by taking an indemnity bond in lieu of the bill of lading and delivering the goods to one who is not entitled to them without producing and surrendering the bill of lading.—Harwood-Barley Mfg. Co. v. Illinois Cent. R. Co., La., 74 So. 569.

24.——Notice of Arrival.—A consignee who has goods shipped home to himself, but makes no effort to notify his folks while he makes the journey, requiring a week on horseback, and who has actual notice the day after his arrival that goods have been received, but does not remove them because of inconvenience, cannot hold the carrier liable as such for loss of his property by fire.—American Express Co. v. Duncan, Tex., 193 S. W. 411.

25. **Carriers of Live Stock**—Notice of Claim.—Stipulation, in contract for shipment of live stock, requiring written notice of claim for damages be given carrier before stock should be removed from destination, as condition precedent to recovery, being founded on reduced rate, and being reasonable, could be insisted on by carrier, unless waived.—Atchison, T. & S. F. Ry. Co. v. Miller, Colo., 163 Pac. 836.

26.——Stipulation.—Stipulation in a bill of lading against liability for injury to live stock unless suit is brought within six months after right of action accrues is not unreasonable, and is valid and binding.—Cherokee Sawmill Co. v. Nashville, C. & St. L. Ry. Ga., 91 S. E. 790.

27. **Carriers of Passengers** — Alighting.—Where woman passenger went to platform to alight unaided in the darkness, and had not made an irretrievable step when train started, jumping from step as train started under necessity brought on by negligence of trainmen, was not contributory negligence.—Guidry v. Morgan's Louisiana & T. R. R. & S. S. Co., La., 74 So. 534.

28.——Anticipating Injury.—A railroad is liable for injury to passenger occasioned by breaking of axle by reason of defect therein, if it could have been discovered by exercise of utmost human skill and foresight.—Haynes v. Louisiana Ry. & Nav. Co., La., 74 So. 538.

29. **Chattel Mortgages**—Cropping Contract.—Where cropping contract provided that title and possession of crop remain in owner of land, and owner furnished supplies to enable cropper to produce crop, mortgage by cropper of his share can only attach to whatever may remain of cropper's portion of crop after owner has been satisfied for advances made.—Pearson v. Lafferty, Mo., 193 S. W. 40.

30. **Commerce**—Constitutional Law. — Agreement, obligating defendant to sell only plaintiff's goods at prices to be fixed by plaintiff held invalid under Vernon's Sayles' Ann. Civ. St., art. 7796, though transaction was interstate.—W. T. Rawleigh Medical Co. v. Mayberry, Tex., 193 S. W. 199.

31.——Employes.—Where an employe wrecker or car repairer of a railroad engaged in both intra- and interstate commerce, was killed while clearing a wreck to allow both local and interstate traffic to proceed, the deceased's work constituted interstate commerce, making the federal Employers' Liability Act applicable.—Denver & R. G. R. Co. v. Wilson, Colo., 163 Pac. 857.

32.——Employers' Liability Act.—In action against railroad for personal injury, it is unnecessary for it to plead federal Employers' Liability Act to obtain benefits of § 6 that no action shall be maintained unless begun within two years from its accrual, for if it develops that the employe was engaged in interstate commerce, the federal law controls.—Seaboard Airline v. Hess, Fla., 74 So. 500.

33.——Waiver.—Although pleadings in action against railroad for wrongful death of employe did not bring case within federal Employers' Liability Act, but evidence admitted without objection did, defendant had not waived its right

to object that plaintiff could not maintain the action under state statute.—Denver & R. G. R. Co. v. Wilson, Colo., 163 Pac. 857.

34. **Confusion of Goods**—Tenancy in Common.—Where poultry in a warehouse becomes mixed by inevitable accident, the original owners become tenants in common of the mass, bearing proportionately any loss, and being in equity entitled to their just proportion of the poultry.—Hobbs v. Monarch Refrigerating Co., Ill., 115 N. E. 534.

35. **Constitutional Law**—Due Process of Law. —Singling out employes engaged in movement of trains by Act Sept. 3-5, 1916, does not render statute invalid as denying equal protection of the laws, where such employes were alone concerned in a dispute threatening interruption of interstate commerce to prevent which statute was enacted.—Wilson v. New, U. S. S. C., 37 S. Ct. 298.

36.——Eight-Hour Day.—The exemption of certain railroads from operation of Act Sept. 3-5, 1916, fixing eight-hour standard working day for employes, does not invalidate the act as denying equal protection of the laws—Wilson v. New, U. S. S. C., 37 S. Ct. 298.

37.——Jury Trial.—Litigant has no vested right to trial by jury of any particular number, and enactment by state of law allowing verdict by 9 of 12 jurors does not deprive litigants of any vested right relating only to matter of procedure.—Illinois Life Ins. Co. v. Prentiss, Ill., 115 N. E. 554.

38.——Pure Seed Law.—The Pure Seed Law is not a violation of the due process clause of Const. U. S. Amend. 14, because § 11 thereof contains a proviso against convicting one able to show that weed seeds named in § 3 of the act are present in quantities not more than 1 to 10,000, etc.—State v. McKay, Tenn., 193 S. W. 99.

39.——Service by Publication.—Alimony liability of non-resident husband served by publication, though inchoate at commencement of divorce suit, may be enforced by injunction order against his bank deposit in local bank, consistently with due process of law guaranteed by Const. U. S. Amend. 14.—Pennington v. Fourth Nat. Bank of Cincinnati, Ohio, U. S. S. C., 37 S. Ct. 282.

40. **Deeds**—Intention.—Where the evident intention of grantor can be carried into effect by construing word "her," before the word "heirs," in habendum of deed, to be intended for "their," such construction will be followed, rather than one which defeats the clearly expressed intention of the grantor.—Ansley v. Graham, Fla., 74 So. 505.

41. **Divorce**—Community Property.—In an action to set aside divorce decree which made a division of community property on agreement of parties and for divorce or to set aside division of property, court properly divided community estate equally and deducted from the plaintiff's half payment made under the agreement, there being no merit in contention that division should be made as in a divorce action.—Swearingen v. Swearingen, Tex., 19 3S. W. 442.

42.——Custody of Children.—Where parents of a delicate child had been twice divorced and remarried, and the child had a good home with the husband's aunt and uncle, and the parents had no permanent home, held, in proceeding to modify a divorce decree as to custody, that it was for the child's best interests to remain where it was.—Waters v. Gray, Mo., 193 S. W. 33.

43. **Eminent Domain**—Navigable River.—The maintenance of a swing bridge over a navigable river gives no prescriptive right to the city to occupy by a permanent structure, part of the river bed covered by the arc of the swing bridge, without condemning the right to the use of the bed.—Metropolitan Inv. Co. of Milwaukee v. City of Milwaukee, Wisc., 161 N. W. 785.

44.——Widening Street.—A city in acquiring land for widening street might lawfully agree with owner, only a portion of whose land was taken, that the street should remain forever open to commercial as distinguished from boulevard use.—City of Chicago v. Lord, Ill., 115 N. E. 543.

45. **False Pretenses**—Immateriality. — In a prosecution for false pretenses, an instruction that accused was guilty if one or all of certain misrepresentations was false is erroneous, because allowing conviction for an immaterial false misrepresentation.—State v. Seymour, Utah, 163 Pac. 789.

46. **Fraudulent Conveyances** — Equity. — A fraudulent conveyance is binding between the parties, and equity will not enforce an agreement by the grantee to hold the property for the grantor and reconvey it on demand.—Rosenbaum v. Huebner, Ill., 115 N. E. 558.

47.——Execution.—A sale by debtor of property in charge of a keeper under an execution levy is not a sale within the meaning of Civ. Code, § 3440, and is valid without immediate delivery.—Williamson v. Monroe, Cal., 163 Pac. 662.

48.——Homestead.—Owner of homestead of value of $1,000 may convey it without interference from his creditors, so that a purchaser of realty, who put $900 cash into the property when he bought it, did not defraud his creditors by having the deed made to his son-in-law.—Rossow v. Peters, Ill., 115 N. E. 524.

48. **Habeas Corpus**—Appeal and Error.—Abolition of federal Circuit Courts by Judicial Code, § 289, removed any authority for appeal to Supreme Court from Circuit Court of Appeals in habeas corpus arising under Rev. St., §§ 763, 764.—Horn v. Mitchell, U. S. S. C., 37 S. Ct. 293.

50. **Highways**—Automobiles. — Apart from statute, it is duty of automobile driver to observe frightened attitude of approaching team of horses or mules, and, if necessary, to check or slacken speed, and to take reasonable precautions to prevent team from getting beyond control of driver.—Burcham v. Robinson, Miss., 74 So. 417.

51.——Evidence.—Where a telephone wire was taut before defendant's employes painted the house to which it was attached, but sagged immediately thereafter, the jury was warranted in finding defendant's employes caused such sagging.—Shenandoah Valley Loan & Trust Co. v. Murray, Va., 91 S. E. 740.

52. **Insurance**—Evidence.—Evidence that insured was found in a drunken condition, dying three days later, the hospital interne assigning acute alcoholism as the cause, is insufficient to avoid a mutual benefit policy on ground that insured died as the result of intemperance, where no other intemperate acts were shown. —Kidd v. National Council of Junior Order of United American Mechanics of United States, Tenn., 193 S. W. 130.

53.——Fraud.—That insured did not understand he was signing a cancellation of his policy, and did not know the insurer's agent had been instructed to secure such cancellation, is insufficient to invalidate the instrument in absence of fraud.—Globe Fire Ins. Co. v. Limburger, Tex., 193 S. W. 222.

54. **Intoxicating Liquors**—Injunction.—Under Rev. St. 1911, art. 4674, held, that a private citizen could maintain an action to enjoin sale of intoxicating liquors to public generally, without a license, by an incorporated athletic club, which was not a bona fide club, but was incorporated as a sham to evade the law.—Rowan v. Stowe, Tex., 193 S. W. 434.

55.——Instructions.—In a prosecution for unlawfully having in his possession at one time more than two quarts of spiritous liquors, instruction ignoring defendant's contention that he had no knowledge of the contents of boxes on a boat in his charge, held reversible error. —Baker v. State, Ga., 91 S. E. 785.

56.——Searches and Seizures.—Under Rem. Code 1915, § 6262—11, providing for issuance of search warrant on affidavit of probable cause to believe that intoxicating liquors are being sold unlawfully, "probable cause" need only be sufficient to create the belief in the mind of the

judge that liquor is being sold contrary to law, and there is no requirement that the cause be stated in the complaint.—State v. Gordon, Wash., 163 Pac. 772.

57. **Landlord and Tenant** — Entry.—Landlord's entry on premises with tenant's consent on condition that she thresh only grain due for rent does not prevent her from applying proceeds of the grain threshed to other debts which lease provided should be paid from crop.—McDowell v. Rathbun, Tex., 193 S. W. 428.

58. **Libel and Slander**—Publication.—Where defendant wrote a letter to a bank, containing libelous statements concerning plaintiff, fact that the bank, and not defendant, published letter, is immaterial.—Cobb v. Garlington, Tex., 193 S. W. 463.

59. **Mandamus**—Demurrer.—Petition by landowner for mandamus to compel municipality controling sole waterworks system to furnish separate meters and connections for tenants held not subject to demurrer because not disclosing that water was not obtained or that tenants had applied for separate connections.—City of Galveston v. Kenner, Tex., 193 S. W. 208.

60.——Discrimination.—Where city by ordinance did not specifically agree to remove ashes from any building, but buildings containing less than five flats were exempted from requirement that owner should at his own expense remove ashes, owner of six-flat building could not by mandamus compel city to remove the ashes, whether the exemption itself was illegal as a discrimination.—People v. City of Chicago, Ill., 115 N. E. 570.

61.——Primary Election.—Mandamus will not issue to compel the board of state canvassers to recall a certificate issued upon primary election returns regular upon their face, although contest proceedings were pending and one return indicated such fact.—Withey v. Board of State Canvassers, Mich., 161 N. W. 781.

62. **Master and Servant**—Course of Employment.—Employe using a barrel as one of implements of his service, who was assaulted by two strangers from whom at direction of his superior he attempted to retake barrel which they were carrying off, held injured in course of his employment within Workmen's Compensation Act.—Nevich v. Delaware, L. & W. R. Co., N. J., 100 Atl. 234.

63.——Course of Employment.—A shoveler held not injured in the course of his employment, as required by Workmen's Compensation Act, § 12, where he exchanged work with a teamster.—Modoc County v. Industrial Acc. Commission of State of California, Cal., 163 Pac. 685.

64.——Eight-Hour Day.—Act Sept. 3-5, 1916, establishing a permanent eight-hour standard for day's work by railroad employes, creates commission to report findings as to its operation to President and Congress within a certain time and forbids carriers, pending such report, to pay for eight hours' work a wage less than existing standard day's wage, with pro rata pay for overtime.—Wilson v. New, U. S. S. C., 37 S. Ct. 298.

65.——Emergency.—Where decedent, shoveling coal in a locomotive tender, was ordered to jump off, and was struck by train moving in opposite direction, whether such result should not have been anticipated by the boss was for the jury.—Topore v. Boston & M. R. R., N. H., 100 Atl. 153.

66.——Employers' Liability Act.—Under Employers' Liability Act, one having a contract to do mason work of a barn for total cost, with 10 per cent additional for superintending, and another having a contract to take immediate charge of carpenter work at a flat rate over cost of labor and materials, both actually engaged in construction of a barn and responsible for laying of a temporary floor over basement, are liable for fatal injuries to a servant of the latter who falls through an unguarded opening in the floor; the test of whether they are servants or contractors not being in the manner of their receiving compensation.—Cauldwell v. Bingham & Shelley Co., Ore., 163 Pac. 827.

67.——Evidence. — Evidence that defendant newspaper's employe threw a tightly folded newspaper into a group, injuring plaintiff, made defendant's negligence a jury question.—Houston Chronicle Pub. Co. v. Lemmon, Tex., 193 S. W. 347.

68.——Hazardous Occupation. — The word "railroading," as used in Acts 1913, c. 6521, in enumerating hazardous occupations, is definite and comprehensive, and includes "work upon a railroad" and "the business of constructing railroads."—Gulf, F. & A. Ry. Co. v. King, Fla., 74 So. 475.

69.——Railroading.—Under Acts 1913, c. 6521, the term "engaged in * * * railroading" applies to the liability of a railroad to an employe engaged in caring day and night for a large number of lights in the yards between the tracks.—Atlantic Coast Line R. Co. v. Holliday, Fla., 74 So. 479.

71.——Workmen's Compensation Act.—Agent to sell realty, agreeing to devote his entire time to selling his employer's lots on a commission, held employe within Workmen's Compensation Act when injured, and not independent contractor.—Brown v. Industrial Accident Commission of California, Cal., 163 Pac. 664.

72.——Workmen's Compensation Act.—Question whether canvassing agent or salesman is employe within Workmen's Compensation Act is of fact, and depends upon circumstances tending to show whether employer had power to exercise over applicant for compensation such personal control as to attribute to latter characteristic of employe.—Brown v. Industrial Accident Commission of California, Cal., 163 Pac. 664.

70.——Switching Crew.—The members of a switching crew, employed by a terminal company engaged in interstate transportation, whose only duties were to move drags of one or more cars to or from car floats and about the terminal yards, are persons actually engaged in or connected with the movements of a train, within the Hours of Service Act.—Brooklyn Eastern Dist. Terminal v. United States, U. S. C. C. A., 239 Fed. 287.

73. **Mines and Minerals**—Lessor and Lessee.—Where lessee of land binds himself to commence drilling well for oil or gas within a year, or to forfeit contract, there is no implied obligation on him to drill as many wells as may be reasonably necessary to secure oil or gas for the advantage of lessors within the year, where it is not found in paying quantities.—Nabors v. Producers Oil Co., La., 74 So. 527.

74. **Municipal Corporations**—Competition in Bidding.—A city charter requirement, that contracts for "work" should be let to the lowest bidder, is inapplicable to a street lighting contract, especially since the rate charged is constantly subject to the Railroad Commission's supervision under Public Utilities Law.—State v. Oconto Electric Co., Wisc., 161 N. W. 789.

75.——Contributory Negligence.—Where ordinance gave vehicle right of way on a street across an intersection and required driver to look to right, one approaching on intersecting street on a motorcycle was bound to know that a vehicle on other street had right of way, and his failure to look for an approaching vehicle resulting in a collision, held contributory negligence constituting the proximate cause of injury.—Livingston v. Barney, Colo., 163 Pac. 863.

76.——Evidence.—In an action to enjoin the construction of a main sewer in a city of about 10,000 population, an assessment for benefits of $36.60 an acre on 160 acres of unplatted land within corporate limits, occupied as acreage property for truck gardening, but available for residential purposes, and worth about $200 an acre, although on extreme boundary of city, without light, water, or streets, held, under evidence, not unreasonable or oppressive.—Whitsett v. City of Carthage, Mo., 193 S. W. 21.

77.——Indictment and Information.—Where a complaint charging defendants with violating an ordinance by visiting a place where gambling

implements were exhibited, named as gambling implements articles which are ordinarily innocently used, such as a table and beans, it was not defective in not further charging that such articles were actually designed and used for gambling.—Stale v. Savidge, Wash., 163 Pac. 738.

78.——Motorcycle.—A motorist who, while temporarily blinded by reflection of lights on his windshield, proceeded blindly and caught conductor of a trolley car, who was on ground adjusting the trolley, between his machine and car, killing him, is liable.—Hammond v. Morrison, N. J., 100 Atl. 154.

79.——Ordinance.—Sidewalk ordinance providing for building of sidewalk with curb walls nine feet deep and vault construction is for one complete construction, and not for a double improvement.—City of Chicago v. Lord, Ill., 115 N. E. 543.

80.——Ordinary Care. — Generally traveler upon street may assume that it is in reasonably safe condition, and is not bound to use ordinary care to discover and avoid dangerous defects and obstructions.—City of Richmond v. McCormack, Va., 91 S. E. 767.

81.——Streets and Sidewalks.—Though a pedestrian can assume that the sidewalks are safe for travel, he may be guilty of contributory negligence if he sees the defect and with knowledge thereof walks thereon rather than to choose a safe place equally open and obvious.—Walker v. John Smith, T., Ala., 74 So. 451.

82.——Traffic Regulation.—A traffic regulation giving a motorist right of way at a street intersection against a vehicle approaching the crossing at the same time from his left does not relieve him of the legal duty to use reasonable care to avoid colliding with such vehicle if its driver disregards such right.—Erwin v. Traud, N. J., 100 Atl. 184.

83. **Negligence**—Proximate Cause. — Where defendant's chauffeur set the brakes and left the car standing at a curb, the interference of a boy who rattled the brake and released it, so that the car started down grade and struck plaintiff, was the proximate cause of the injury, and defendant, even if negligent, was not liable.—Rhad v. Duquesne Light Co., Pa., 100 Atl. 262.

84. **Perpetuities**—Rule Against. — Trusts in favor of testator's son and daughter or grandson, or them collectively, and the survivor of them for life, and for 21 years after death of beneficiary named or last survivor, did not violate rule against perpetuities.—Kolb v. Landes, Ill., 115 N. E. 539.

85. **Principal and Agent**—Implied Authority.—An agent, authorized to engage singers for recitals in connection with phonograph records, held to have implied authority to bind his principal to pay the singer, notwithstanding an undisclosed restriction to arrange for only such recitals as the dealers would pay for.—Kidd v. Thomas A. Edison, Inc., U. S, D. C., 239 Fed. 405.

86. **Railroads** — Contributory Negligence. — Plaintiff, attempting to drive over dangerously defective crossing in front of fast train, visible for quarter of a mile, and engine of whose car lost power so that it stopped between rails too late for engineer to avoid collision, was guilty of contributory negligence barring his recovery, notwithstanding negligence in maintaining defective crossing.—Bunton v. Atchison, T. & S. F. Ry. Co., Kan., 163 Pac. 801.

87.——Fencing Track.—In action against railroad company for killing of stock, burden is on the company, place of accident not being fenced, to show that it was not permitted by law to fence such place, or that to do so would endanger train operatives or inconvenience public.—Ft. Worth & D. C. Ry. Co. v. Decatur Cotton Seed Oil Co., Tex., 193 S. W. 392.

88.——Right of Way.—Where deed conveyed "the full and perfect right of way" without specifying its width, railroad might appropriate such width as its board of directors in their honest judgment deemed necessary for its present and future purposes.—Rodgers v. Pittsburgh, Ft. W. & C. Ry. Co., Pa., 100 Atl. 271.

89. **Sales**—Contract.—Where a contract of sale required shipment of engine "at once," shipment as soon as railway company furnished a car and within two days was sufficient.—Lawson v. Hobbs, Va., 91 S. E. 750.

90.——Implied Warranty.—On sale of carload of fruit subject to inspection and acceptance, if acceptance follow inspection, there is no implied warranty that fruit was in good condition.—Harper v. Earl Fruit Co., Kan., 163 Pac. 803.

91.——Implied Warranty.—In a seller's action for price, a general denial does not present the issue that the seller breached an implied warranty.—Denver Auto Goods Co. v. Peerless Radiator Co., Colo., 163 Pac. 855.

92. **Sunday**—Contract.—Code Va. 1904, § 3799, which makes it a criminal offense if "a person on the Sabbath day be found laboring at any trade or calling," does not render illegal an instrument granting an option to purchase real estate, because executed on Sunday.—Dunlop v. Baker, U. S. C. C. A., 239 Fed. 193.

93. **Vendor and Purchaser**—Description. — Where land was described in a contract of sale as about 60 feet, "more or less," fronting on a street, a deficiency of 7 feet did not abate the price or raise a presumption of fraud.—Cashman v. Bean, Mass., 115 N. E. 574.

94.——Escrow.—Under contract for purchase of land requiring second payment within 60 days, after acceptance of title, provided vendor should have sufficient warranty deed ready for delivery in escrow, and that purchaser would deliver his note and trust deed for balance of purchase money, vendor was not in default as to specifying form of trust deed until its was required to be given.—Lang v. Hedenberg, Ill., 115 N. E. 566.

95.——Homestead.—Where owner of homestead conveyed it to his daughter before levy of order of attachment, the land could not be levied on as property of homesteader.—First Nat. Bank v. Coates, Okla., 163 Pac. 714.

96. **Water and Water Courses** — Riparian Owner.—Although a riparian owner has almost completed a dam on his land for impounding the waters of a stream to be used on non-riparian land, a lower riparian owner injured will not be limited to an action for damages; his right not being invaded till flow of water is interfered with.—Longmire v. Yakima Highlands Irrigation & Land Co., Wash., 163 Pac. 782.

97. **Wills**—Attorney and Client.—An attorney, a friend of testatrix, summoned to her bedside, and asked to prepare her will, acted in his professional capacity, and though, without advising, he merely reduced testatrix's directions to writing.—Graham v. Courtright, Iowa, 161 N. W. 774.

98.——Construction. — Under will creating trust for grandson for life and to his children for 21 years, and if he left no children surviving the income for such period to testator's son and daughter, with remainder in fee to his brothers and sisters, the limitation to the brothers and sisters was not restricted to death of the grandson before death of testator.—Kolb v. Landes, Ill., 115 N. E. 539.

99.——Construction.—Under a will providing that after death of son and daughter the net proceeds, etc., shall be divided one-half the amount to "children" of my son, and the other half between the "children" of my daughter, children of a deceased son of daughter are not included.—In re Pulis, 115 N. E. 516, N. Y., 220 N. Y. 196.

100.——Devise.—Under a devise to testator's four daughters in equal shares for life, and on death of a daughter without issue her share to go to "survivors and survivor of my children and the lawful issue of such of my children as shall be dead," a surviving daughter took a half and a child and grandchildren of a deceased daughter, the other daughters having died without issue, took the other half, to be divided among them per capita, although they were of two generations.—In re Van Cleef, N. Y., 163 N. Y. Supp. 1098.